

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	
	)	
Petitions for Declaratory Ruling and Retroactive	)	
Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)	)	
Regarding the Commission's Opt-Out Notice	)	
Requirement for Faxes Sent with the Recipient's	)	
Prior Express Permission	)	

**TCPA PLAINTIFFS' REPLY IN SUPPORT OF APPLICATION FOR REVIEW OF  
NOVEMBER 2, 2016 BUREAU ORDER**

Pursuant to Section 1.115 of the Commission's rules, TCPA Plaintiffs<sup>1</sup> submit the following Reply in support of their Application for Review of the Order issued by the Consumer & Governmental Affairs Bureau on November 2, 2016, purporting to grant "retroactive waivers" from 47 C.F.R. § 64.1200(a)(4)(iv) to 22 petitioners.<sup>2</sup> TCPA Plaintiffs filed their Application for Review on December 2, 2016.<sup>3</sup> Oppositions were filed by three waiver recipients: Legal & General America, Inc. ("LGA"), Humana Ins. Co. ("Humana"), and Buccaneers Limited Partnership ("BLP"). As argued below, the Commission should reject the arguments raised in the oppositions and vacate all waivers granted in the November 2, 2016 Bureau Order.

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<sup>1</sup> The TCPA Plaintiffs are Lawrence S. Brodsky; JT's Frames, Inc.; Career Counseling, Inc. d/b/a Snelling Staffing Services; Big Thyme Enterprises, Inc.; Whiteamire Clinic, P.A., Inc.; Cin-Q Automobiles, Inc.; Medical & Chiropractic Clinic, Inc.; Shaun Fauley; St. Louis Heart Center, Inc.; JWD Automotive, Inc.; Russell M. Holstein, PhD, LLC.; Carradine Chiropractic Center, Inc.

<sup>2</sup> *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338, 2016 WL 6538219 (CGAB Nov. 2, 2016) ("November 2, 2016 Bureau Order").

<sup>3</sup> Application for Review, CG Docket Nos. 02-278, 050338 (Dec. 2, 2016).

## Argument

**I. The Oppositions do not dispute that there is no evidence any person was ever “confused” about the opt-out-notice rule and all available evidence shows that the industry, legal commentators, and the courts all understood the rule.**

Plaintiffs’ Application for Review argues that (1) the Commission has no authority to “waive” liability in a private TCPA right of action pending in a court of law and (2) the contemporaneous evidence shows the “industry” immediately understood opt-out notice was required on faxes sent with prior express permission, and there is no evidence to support a “presumption of confusion.”<sup>4</sup>

On the first point, Plaintiffs understand that the propriety of the waivers granted in the October 30, 2014 Order is under review by the D.C. Circuit Court of Appeals in the *Bais Yaakov* appeal. Plaintiffs have raised the point to preserve their right to appeal from the November 2, 2016 Bureau Order and any final order of the Commission on this Application for Review.

Notably, however, BLP argues that the November 2, 2016 Bureau Order does not violate the separation of powers because “[t]he ultimate outcome of any private TCPA litigation, and the effect of any waiver thereupon, will be decided by the relevant court.”<sup>5</sup> BLP is correct that the November 2, 2016 Bureau Order does not say what effect, if any, the “waiver” is supposed to have in private TCPA litigation. The Commission should clarify whether the BLP waiver is designed to prevent the United States District Court for the Middle District of Florida from finding a violation of 47 C.F.R. § 64.1200(a)(4)(iv) in the pending private TCPA litigation against BLP.<sup>6</sup>

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<sup>4</sup> TCPA Pls.’ Application for Review at 5–6.

<sup>5</sup> BLP Opp. at 4.

<sup>6</sup> Of course, BLP does not claim that it obtained “prior express invitation or permission” from any of the over 130,000 targets of its junk-fax campaign to sell tickets to Tampa Bay Buccaneers football games in 2009 and 2010.

On the second point, all three Oppositions mischaracterize Plaintiffs' Application as arguing that under the October 30, 2014 Order, a waiver petitioner is required to show that it was actually "confused" about whether opt-out notice was required on faxes sent with prior express permission.<sup>7</sup> That is incorrect. Plaintiffs acknowledge that the October 30, 2014 Order did not require petitioners to show they were actually confused, which is one of the grounds upon which that Order is being challenged in the D.C. Circuit in the *Bais Yaakov* appeal.

The argument Plaintiffs made in this Application for Review (which is also raised in the Applications for Review from the August 28, 2015 Bureau Order and the December 9, 2015 Bureau Order), is that it makes no sense to create a "presumption" that an entire "industry" was confused where (1) there is no evidence that *anyone* was ever confused and (2) the only evidence that does exist shows that regulated entities, commentators, and the courts all understood that the 2006 Order required opt-out notice on faxes sent with prior express permission. None of the Oppositions actually deals with that argument, and the Commission should rule that the presumption of confusion is no longer appropriate.

**II. Humana does not dispute that it had actual knowledge of the opportunity to seek a waiver yet waived over a year to file a petition.**

Plaintiffs showed in their Application for Review that Humana had actual knowledge of the opportunity to seek a waiver, at the latest, by September 28, 2014, and yet failed to file a waiver petition until December 18, 2015.<sup>8</sup> Humana does not dispute these facts, nor deny that it had actual knowledge that the Commission granted waivers in the October 30, 2014 Order and stated similarly situated parties could seek waivers, with the "expectation" that parties do so by

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<sup>7</sup> LGA Opp. at 3; Humana Opp. at 3; BLP Opp. at 4.

<sup>8</sup> TCPA Pls.' Application for Review at 7.

April 30, 2015.<sup>9</sup> Instead, Humana argues all these facts are “irrelevant” and the only thing that matters is that its faxes were sent prior to April 30, 2015.<sup>10</sup>

The Commission should make clear that its “expectation” that parties file by April 30, 2015, was not mere surplusage and deny Humana’s waiver. Affirming the Bureau’s ruling would mean that a party can send non-compliant faxes on April 29, 2015, be sued on April 29, 2019 (the last day of the four-year statute of limitations period), then attempt to litigate the validity of the opt-out regulation for six years in district court in violation of the Hobbs Act (as Humana did), and then file a waiver request in April 2025. Under the Bureau’s rationale, that petition will have to be granted. Denying the Humana petition as untimely will not mean that all petitions filed after April 30, 2015 are automatically “barred,” as Humana argues.<sup>11</sup> It simply means that when the Commission says it “expects” something to be done within six months, a party cannot sit on its hands for over a year and then say the delay is “irrelevant.”

### **III. The Commission should deny the BLP Petition as untimely.**

BLP filed its waiver petition on April 28, 2016, nearly one year after April 30, 2015. Like Humana, BLP argues this fact is irrelevant and that the Commission’s “expectation” that parties file within six months of the October 30, 2014 Order was merely a “request.”<sup>12</sup> Again, the Commission’s expectation that parties file by April 30, 2015, either has meaning or it does not.

BLP also argues that the fact that it is represented in the private TCPA litigation by the same law firm that litigated the *Anda* petition that led to the October 30, 2014 Order is irrelevant

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<sup>9</sup> Humana Opp. at 4.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> BLP Opp. at 5.

because that firm did not file an appearance on BLP's behalf until July 20, 2015.<sup>13</sup> BLP provides no explanation for its admitted nine-month delay, which is in itself sufficiently egregious to make BLP ineligible for a waiver.

BLP is one of the most prolific junk faxers involved in these proceedings, having plastered the Tampa area with 343,122 advertisements for tickets to Tampa Bay Buccaneers games sent to 131,011 fax numbers from 2009 to 2010. BLP does not claim to have obtained "prior express invitation or permission" from anyone, and it is not entitled to any leniency on its late-filed petition. The Commission should make clear that its "expectation" that parties file by April 30, 2015, was not mere surplusage and deny the BLP waiver.

### **Conclusion**

For the foregoing reasons, the Commission should vacate all of the waivers granted in the November 2, 2016 Bureau Order, particularly the waivers granted to Humana and BLP, each of which willfully disregarded the Commission's "expectation" that parties file petitions by April 30, 2015.

Dated: December 28, 2016

Respectfully submitted,

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<sup>13</sup> *Id.* at 6, n.18.

**CERTIFICATE OF SERVICE**

I, Brian J. Wanca, do hereby certify that on December 28, 2016, I caused the foregoing TCPA Plaintiffs' Reply In Support of Application for Review of November 2, 2016 Bureau Order to be served on the parties listed on the attached service list via U.S. first-class mail, postage prepaid.

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